

State of Vermont
WATER RESOURCES BOARD

Re: Aquatic Nuisance Control Permit #C93-01-Morey
Lake Morey, Town Of Fairlee, Vermont
Docket No. WQ-93-04

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On June 4, 1993, the Water Resources Board (Board) received an appeal filed by David Adams, Kern McCarty and Amy McCarty (Appellants), by and through their attorney, Paul S. Gillies, Esq., of the firm Tarrant and Marks, from an Aquatic Nuisance Control Permit, #C93-01-Morey, issued by the Department of Environmental Conservation (DEC) of the Agency of Natural Resources (ANR) on May 11, 1993, to the Town of Fairlee (permittee) authorizing, the application of the aquatic herbicide, Garlon 3A, to the waters of Lake Morey, located in the Town of Fairlee, Vermont, for the purpose of controlling Eurasian watermilfoil. This permit was granted under the authority of 10 V.S.A. § 1263a. In their notice of appeal, the appellants challenged the DEC's determinations under three of the statutory criteria, 10 V.S.A. §1263a(e)(1), (2) and (3), on the following grounds: that there is a reasonable non-chemical alternative available; that there is an unacceptable risk to the nontarget environment; and that there is more than a negligible risk to public health. This appeal was filed pursuant to 10 V.S.A. §1269.

On June 4, 1993, the appeal was deemed substantially complete and docketed. On that same date, a Notice of Appeal and Prehearing Conference was sent to persons required to receive notice and published in the Valley News on June 5, 1993, pursuant to Rule 18 of the Board's Rules of Procedure.

Written notices of appearance were filed by the permittee, represented by David A. Otterman, of the firm Otterman and Allen on June 4, 1993; William and Marjorie Scott on June 16, 1993; Donald Weaver on June 16, 1993; Philip H. Zalinger, Jr., and Ann Kennard Zalinger on June 16, 1993; Kenneth D. Allen for the Lake Morey Protective Association (LMPA) on June 16, 1993; Richard A. Allen on June 17, 1993; and James and Margaret Southworth on June 18, 1993.

On June 18, 1993, at 2:00 p.m., a prehearing conference was convened at the Midstate Regional Library in Berlin, Vermont, by the Board's delegate, Kristina L. Bielenberg, pursuant to Rule 14(A) of the Board's Rules of Procedure. The following persons were present and participated:

David Adams and Amy McCarty, appellants
Paul S. Gillies, Esq., attorney for the appellants
Peter Durgin, Selectman, Town of Fairlee, the permittee
David A. Ottenan, Esq., attorney for the permittee

Anne Whiteley, Esq., Acting General Counsel, ANR
Ann Bove, DEC
Wallace McLean, DEC
Kenneth D. Allen, President, **LMPA**, and shoreland owner
Donald Weaver, shoreland owner and direct-intake user
James Southworth, shoreland owner
William Scott, shoreland owner and direct-intake user
Richard A. Allen, shoreland owner and LWPA member
Evelyn Adams, Town of **Fairlee** resident
Carol Thurston, Town of **Fairlee** resident

Also present was Joan Mulhern of the Vermont Public Interest Research Group (VPIRG).

II. **ISSUES**

Based on the appellants' notice of appeal, the contested issues in this case relate only to those portions of the Town of **Fairlee's Integrated** Management Plan (IMP) calling for the application of the **aquatic herbicide**, Garlon 3A, to the waters of Lake Morey to control Eurasian watermilfoil. Therefore, the appellants challenge the Secretary's issuance of Aquatic Nuisance Control Permit, **#C93-01-Morey**, and ask the Board, to decide the following questions, pursuant to 10 V.S.A. **§1263a(e)**:

1. Whether there is **no reasonable** nonchemical alternative available:
2. Whether there is acceptable risk to the nontarget environment; and
3. Whether there is negligible risk to **public health**.

At the prehearing conference, the appellants requested the inclusion of the following issue, which was not objected to by the permittee, ANR, **and others in attendance**:

4. **Whether** there is a public benefit to be achieved from the application of the herbicide Garlon 3A.

The attorney for the appellants also indicated that he might supplement the notice of appeal to add additional appellants and to challenge the **DEC's** determination based on other grounds! such as the public trust doctrine and procedural deficiencies in the **DEC's** permitting process. The permittee and ANR requested an **opportunity** to respond to any supplemental filing.

III. PARTY STATUS

1. The following have party status as of right, pursuant to 10 V.S.A. § 1269 and Rule 22(A) of the Board's Rules of Procedure:
 - a. Kern McCarty and Amy McCarty, appellants, lakeshore owners and direct-intake users --
 - b. The Town of Fairlee, permittee
 - c. The Agency of Natural Resources (ANR). The ANR will participate for the limited purpose of examining witnesses and briefing issues.

2. David Adams is presently identified as an appellant. However, at the Prehearing Conference, the permittee challenged his standing in this appeal, pursuant to 10 V.S.A. § 1269 and Rule 22 of the Board's Rules of Procedure. Therefore, Mr. Adams should be prepared to supplement his previous filings with a timely written response to any objections filed with the Board regarding his standing or party status in accordance with the deadlines and terms set forth in the Prehearing Conference Order below.

3. The Board may grant party status to the following persons and organizations, provided that they file timely written party status petitions with the Board in accordance with the requirements of Rule 22 of the Board's Rules of Procedure and the deadlines and terms set forth in the Prehearing Conference Order below.
 - a. Kenneth D. Allen, President, LWPA, and shoreland owner
 - b. Donald Weaver, shoreland owner and direct-intake user
 - c. James and Margaret Southworth, shoreland owners
 - d. William Scott, shoreland owner and direct-intake user
 - e. Richard A. Allen, Chair of Lake Morey Commission and shoreland owner
 - f. Philip H. Zalinger, Jr., and Ann Kennard Zalinger, shoreland owners
 - g. Evelyn Adams, Town of Fairlee resident
 - h. Carol Thurston, Town of Fairlee resident

IV. STANDARD OF REVIEW

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding, pursuant to 10 V.S.A. § 1269. The appellants have requested that if the Board cannot make affirmative findings and conclusions with respect to the statutory standards of 10 V.S.A. § 1263a(e), it should reverse or modify the decision

of the DEC so as to not authorize the use of Garlon 3A in the waters of Lake Morey. If the Board decides to modify the decision, the appellants, the permittee, and the ANR have requested the opportunity to propose new or modified conditions.

V. PRELIMINARY MATTERS

Any party or prospective party wishing to brief any preliminary issues such as the scope of this proceeding, the nature of de novo review, or the burden of production and persuasion, may do so by filing written memoranda with the Board in accordance with the deadlines and terms set forth in the Prehearing Order below.

VI. WITNESSES, EXHIBITS, PREFILED TESTIMONY, AND STIPULATIONS

A Supplemental Prehearing Order reflecting a schedule for filing final witness lists, exhibits, prefiled testimony, and stipulations will be issued subsequent to the resolution of party status and various other preliminary matters in this proceeding.

At the Prehearing Conference, parties and prospective parties requested that prefiled testimony be filed in the format of letter summaries rather than in question-and-answer format. Confirmation concerning the format for filing prefiled testimony and exhibits will be given to the parties in the Supplemental Prehearing Order.

VII. COURT REPORTERS AND A STENOGRAPHIC RECORD

At the prehearing Conference, the permittee asked the appellants to stipulate to sharing the costs of a stenographic recording of this proceeding.

The parties are urged to reach a stipulated agreement concerning the allocation of costs associated with the creation of a stenographic record including all fees, hourly rates, and copying costs, keeping in mind that other persons or organizations not signatories to the agreement may want to obtain copies of a transcript at a reasonable rate. A copy of the stipulation shall be filed with Board in accordance with the terms set forth in the Prehearing Order below or any subsequent Supplemental Prehearing Order. The appellants and the permittee are referred to Rule 28(C) of the Board's Rules of Procedure concerning notice and other obligations in securing a stenographic record.

VIII. ORDER

1. On or before 9:00 a.m., Tuesday, July 6, 1993, the appellants, by and through their attorney, shall file any supplemental writing identifying additional appellants or issues to be considered by the Board in this **proceeding**. The appellants shall also file by this date any supporting memoranda of law.
 2. On or before **4:30 p.m.**, Thursday, July **8**, 1993, all persons or organizations seeking intervention as of right or by permission in this proceeding, as identified in 111(3) above, shall file **written** petitions for party status, pursuant to Rule 22 of the Board's Rules of **Procedure**. Any organization seeking intervention must submit a copy of minutes or other indicia of official action authorizing a representative's participation in this proceeding, pursuant to **Rule** 23(B) of the Board's Rules of Procedure.
 3. On or before **4:30 p.m.**, Monday, July 12, 1993, the permittee and/or **ANR** may file written objections concerning the standing of David Adams and the addition of appellants or issues not identified by **the** appellants prior to the Prehearing Conference. Objections shall be supported by memoranda of law.
 4. On or before **4:30 p.m.**, Monday, July 12, 1993, any person or organization supporting or opposing the grant of party status to persons seeking intervention in accordance with (2) **above** may file a written motion and supporting memorandum of, law.
 5. On or before **4:30 p.m.**, Monday, July 12, 1993, any person or organization wishing **to address** the issues identified in V. above, may file a memorandum of **law** with **the Board**.
 6. Any written request for a stenographer and stipulation concerning the terms for the allocation of costs shall be filed with the Board at least ten **(10) days** prior to the first hearing at which stenographic services are required:
 7. All participants in this proceeding shall file an original and five (5) **copies** of any motions, memoranda, **or** other filings with the Board, **and** mail one copy to each of the persons listed on the attached **Certificate** of Service. A certificate of service indicating delivery to all listed persons by hand or by first class mail shall also be filed with the Board and parties. The Board does not accept filings by FAX.
 8. **Pursuant to** Rule 24(B) of the Board's Rules of Procedure, this order will be binding on all persons who have received notice of the Prehearing Conference, unless there is a **timely** objection to
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the Prehearing Conference Order, or a showing of cause for, or fairness requires waiver of a requirement of this Prehearing Order.

Dated at Montpelier, Vermont, 'this ^{1st} --- day of July, 1993.

Water Resources Board,
by its Chair

Dale A. Rocheleau

Dale A. Rocheleau

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